IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 101 OF 2004

SHRI BERNAND D'SOUZA(DEC.) THROUGH L.RS., ...Appellant

Versus

SHRI SHAMBA CHONDRU GAONKAR(DEC.) THROUGH L.RS., ...Respondent

Shri Sudin Usgaonkar, Advocate for the Appellants.
Shri J.J. D'souza, U/las for Respondents.

Coram:- D. D. SINHA, J.

Date:- 22nd November, 2005

P.C.:

Heard Shri S.M. Usgaonkar, the learned counsel for the appellants and Shri J. D'Souza, learned counsel for the respondents.

2. The Second Appeal is directed against the concurrent findings of fact given by both the courts below. In the instant case the suit was filed by the plaintiffs/respondents for specific performance, possession, mandatory injunction and consequential reliefs. The suit was decreed by Judgment and Decree dated 29.02.2000 and the present appellants/original defendants were directed to comply with the terms of the oral agreement and were also asked to hand over one shop to the plaintiffs/respondents within three months and to pay the rent of two shops in occupation of the present appellants/defendants and another one shop was directed to be handed over by the defendants to the plaintiffs. The defendants were also asked to pay Rs.5000/- towards rent per year. In the alternative, the appellants/defendants were directed to pull down the suit structure and restore the land beneath to its original position and was permitted to take away all the material of the demolished structure within three months.

The appellants/defendants and their servants were restrained by permanent injunction from erecting any fence around the suit structure or interfering in any manner in the open land of the suit structure. The lower appellate court partly allowed the appeal filed by the defendants and part of the judgment and decree whereby the trial Court has directed the defendants to hand over possession of the shop to the plaintiffs and part of the judgment and decree whereby the trial Court ordered demolition of the suit structure were set aside.

3. The learned counsel for the appellants contended that in the instant case the substantial questions of law involved are:- (1) Whether once execution of documents is admitted, the burden lies on the party executing it to prove that the execution is fraudulent ? and (2) Whether a contract which is uncertain and vague is void ? The above referred two questions were pressed into action by the learned counsel for the appellants.

4. In the instant case it is not in dispute that the suit which was filed on the basis of the oral agreement, the property in which the shops were constructed, undoubtedly belongs to the plaintiffs. The defendants though have taken the plea that the respondents/plaintiffs were paid Rs.15,000/- towards the cost of he land and though produced the receipt issued by the plaintiffs, no steps were taken by the defendants to get the sale deed executed nor has filed any suit for declaration and title. Both the courts below, on the basis of the evidence adduced by the parties, considered the factual aspect of the matter and recorded its finding. The lower appellate court in my view modified the Judgment/Order passed by the trial Court and granted relief to the present Appellants/original defendants to retain the shops and to pay the rent of Rs.5000/-. Since the agreement being of oral nature however proved by the plaintiffs, in my view, the finding recorded by the courts below is based on the evidence adduced by the parties.

5. The first substantial question of law framed by the appellants referred to hereinabove is completely misconceived and such contingency

does not exist in the instant case. So far as the second substantial question of law raised by the appellants again referred to hereinabove, in the facts and circumstances of the present case, and considering the nature of the evidence adduced by the parties as well as nature of oral contract also cannot be treated to be a substantial question of law and therefore there is no merit in the Second Appeal. Same is dismissed.

D. D. SINHA, J.

sl.